Small Medium Enterprise Development Bank Malaysia Bhd v Pekan Legasi Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22M-1051–12 OF 2019
AZLAN SULAIMAN JC
12 OCTOBER 2022

Civil Procedure — Setting aside — Judgment in default ('JID') — Guarantors applied after more than a year to set aside JID entered against them for amount owing by borrower to plaintiff — Whether guarantors' failure to apply for extension of time and to explain their delay rendered application defective — Whether service of writ and statement of claim on guarantors was proper as plaintiff had adopted mode of service prescribed in guarantee document — Whether guarantors could not complain about amount owed by borrower as certificate of indebtedness signed by plaintiff was conclusive proof of same and was binding on guarantors — Whether guarantors could not insist plaintiff sold off borrower's assets first before acting against them as plaintiff was entitled in law to pursue all of its remedies simultaneously

The plaintiff had entered judgment in default ('JID') against all the defendants herein for the total amount due under a loan the plaintiff had granted to the first defendant company which was not repaid. The senior assistant registrar ('SAR') dismissed an application by the second and third defendants ('D2' and 'D3') — who had jointly and severally guaranteed the repayment of the loan — to set aside the JID. In their instant appeal against the said dismissal, D2 and D3 argued that: (a) the service of the writ and statement of claim on them by registered post was defective, entitling them to set aside the JID as of right; (b) the plaintiff was obliged to sell off the first defendant's assets first before proceeding against them; and (c) the amount claimed was excessive, devoid of particulars and inconsistent with the first defendant's statements of account.

Held, dismissing the appeal and affirming the SAR's decision:

(1) The application to set aside the JID was filed more than a year after the JID was entered. Under O 13 r 8 read with O 42 r 13 of the Rules of Court 2012 ('the ROC'), D2 and D3 ('the defendants') should have applied for extension of time to file their application and explained the delay in the application. No credible explanation was given by the defendants for the delay (see paras 10–11).

(2) The defendants contended that service of the writ and statement of claim on them was defective because the plaintiff had not complied with O 10 r 1(1) of the ROC. The plaintiff had, instead, relied upon O 10 r 3 which

permitted service of the writ pursuant to the terms of a contract, in this case, the guarantee agreement that the defendants had executed. As the writ and statement of claim were served on the defendants by registered post in accordance with cl 17 of the guarantee and the plaintiff had adduced in evidence slips issued by the postal authorities establishing when the service was done, the service was good in law and the objection failed (see paras 13–21).

(3) Clause 1 of the guarantee expressly provided that the defendants jointly and severally and unconditionally and irrevocably agreed to guarantee and indemnify the plaintiff in respect of the repayment of the loan by the first defendant. The plaintiff's right under the guarantee to proceed against D2 and D3 without recourse to the first defendant was further clarified in cll 3, 7, 8 and 9 of the guarantee. The Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 and *Chan Boi Loi v Public Bank Bhd and another application* [2011] 1 MLJ 478 had established that a lender was entitled to pursue with all remedies simultaneously, contemporaneously or successively to recover monies that were due to it unless there was any agreement to the contrary (see paras 22–24).

(4) Pursuant to cl 14 of the guarantee, the certificate of indebtedness signed by the plaintiff as to the amount owing by the first defendant was conclusive and binding proof of the same as againt D2 and D3 and the plaintiff was under no obligation to provide the guarantors with details (see paras 25–27).

[Bahasa Malaysia summary

Plaintif telah memasukkan penghakiman ingkar ('PI') terhadap kesemua defendan di sini untuk jumlah tertunggak untuk pinjaman yang telah diberikan oleh plaintif kepada syarikat defendan pertama yang tidak dibayar balik. Penolong kanan pendaftar ('PKP') menolak permohonan defendan kedua dan ketiga ('D2' dan 'D3') — yang telah secara bersama dan berasingan menjamin pembayaran balik pinjaman — untuk mengenepikan PI tersebut. Dalam rayuan ini mereka terhadap keputusan tersebut, D2 dan D3 berhujah bahawa: (a) penyerahan writ dan pernyataan tuntutan kepada mereka melalui pos berdaftar adalah defektif dan membolehkan mereka mengenepikan PI tersebut; (b) plaintif haruslah menjual aset defendan pertama terlebih dahulu sebelum meneruskan prosiding terhadap mereka; dan (c) jumlah tuntutan adalah berlebihan, tidak mempunyai butiran terperinci dan tidak konsisten dengan penyata akaun defendan pertama.

Diputuskan, menolak rayuan dan mengekalkan keputusan PKP:

(1) Permohonan untuk mengenepikan PI telah difailkan lebih dari setahun selepas PI tersebut dimasukkan. Menurut A 13 k 8 yang dibaca bersama

A 42 k 13 Kaedah-Kaedah Mahkamah 2012 ('KKM'), D2 dan D3 ('defendan-defendan') sepatutnya memohon lanjutan masa untuk memfailkan permohonan mereka dan menjelaskan kelewatan dalam memfailkan permohonan itu. Tiada penjelasan yang boleh dipercayai yang diberikan oleh defendan atas kelewatan itu (lihat perenggan 10–11).

(2) Defendan-defendan menghujahkan bahawa penyerahan writ dan pernyataan tuntutan kepada mereka adalah defektif kerana plaintif tidak mematuhi keperluan A 10 k 1(1) KKM. Sebaliknya, plaintif bergantung kepada A 10 k 3 yang membenarkan penyerahan writ itu menurut terma kontrak, di dalam kes ini, melalui perjanjian jaminan yang telah dilaksanakan oleh defendan-defendan. Oleh kerana writ dan pernyataan tuntutan diserahkan kepada defendan-defendan melalui pos berdaftar menurut klausa 17 jaminan dan plaintif telah mengemukakan dokumen keterangan yang dikeluarkan oleh pihak pejabat pos yang menunjukkan penyerahan telah dibuat, oleh yang demikian penyerahan tersebut adalah sah menurut undang-undang dan bantahan tersebut adalah gagal (lihat perenggan 13–21).

(3) Klausa 1 jaminan jelas memperuntukkan bahawa defendan-defendan secara bersama dan berasingan serta tanpa syarat dan tidak boleh ditarik balik bersetuju untuk menjamin dan membayar ganti rugi kepada plaintif untuk membayar balik pinjaman yang dibuat oleh defendan pertama. Hak plaintif di bawah jaminan untuk menyaman D2 dan D3 tanpa kebenaran defendan pertama dijelaskan lagi di dalam klausa 3, 7, 8 dan 9 jaminan. Mahkamah Persekutuan dalam kes *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 dan *Chan Boi Loi v Public Bank Bhd and another application* [2011] 1 MLJ 478 memutuskan bahawa pemberi pinjaman berhak untuk menggunakan semua remedi secara serentak, serentak atau berturut-turut untuk mendapatkan semula wang yang perlu dibayar melainkan terdapat sebarang perjanjian sebaliknya (lihat perenggan 22–24).

(4) Menurut klausa 14 jaminan, sijil keberhutangan yang ditandatangani oleh plaintif mengenai jumlah yang terhutang oleh defendan pertama adalah bukti konklusif dan mengikat D2 dan D3 dan plaintif tidak mempunyai kewajipan untuk memberikan butiran hutang kepada penjamin-penjamin (lihat perenggan 25–27).]

Cases referred to

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685, FC (refd)

Chan Boi Loi v Public Bank Bhd and another application [2011] 1 MLJ 478, FC (folld)

Citibank Na v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)

Goh Teng Whoo & Anor v Ample Objectives Sdn Bhd [2021] 3 MLJ 159, FC (distd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (folld)
Small Medium Enterprise Development Bank Malaysia Bhd v Pekan Legasi Sdn Bhd & Ors [2022] MLJU 966; [2022] 7 CLJ 139, HC (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)

Legislation referred to

Companies Act 2016 s 466
Rules of Court 2012 O 10 rr 1(1), 3, O 13 r 8, O 42 r 13, O 56

Nor Shahadah Saari (Shukor Baljit & Partners) for the plaintiff.
Yeong Yen Zen (Justin Faye & Partners) for the defendants.

Azlan Sulaiman JC:

BACKGROUND LEADING UP TO THE DECISION APPEALED

[1] By this suit filed on 13 December 2019, the plaintiff sought to recover the outstanding amounts under loan facilities it had granted to the first defendant, which the second and third defendants had jointly and severally guaranteed repayment of.

[2] On 9 January 2020 the plaintiff entered a judgment in default of appearance against all of the defendants ('default judgment'), and a little over a year later on 29 January 2021 they jointly applied to set the default judgment aside ('setting aside application'). The senior assistant registrar dismissed the setting aside application on 15 April 2021, following which on 28 April 2021 they jointly appealed to the judge under O 56 of the Rules of Court 2012 ('appeal').

[3] However, on 24 January 2021, in between that senior assistant registrar's decision and the appeal, the first defendant was ordered wound-up and the official receiver appointed as its liquidator. The plaintiff then applied to strike out the appeal on the ground that the first defendant had no locus standi to lodge it as the official receiver was neither involved nor had knowledge of it when it was filed ('striking out application').

[4] On 20 April 2022, I allowed the striking out application but only as against the first defendant, holding that the second and third defendants did have locus standi to file and proceed with the appeal in their own stead and that the incapacity of the first defendant to do so should neither incapacitate nor be visited upon them. My judgment on that decision is reported in *Small Medium*

Enterprise Development Bank Malaysia Bhd v Pekan Legasi Sdn Bhd & Ors [2022] MLJU 966; [2022] 7 CLJ 139.

[5] I then fixed the appeal for hearing vis a vis the second and third defendants. However, in the meantime, the first defendant appealed to the Court of Appeal against my decision allowing the striking out application against it ('first defendant's appeal'), and the second and third defendants applied to stay the hearing of the appeal against them pending the disposal of the first defendant's appeal ('stay application').

[6] On 5 September 2022, I dismissed the stay application on the grounds that the second and third defendants were not involved in the first defendant's appeal and that there were no special circumstances preventing me from proceeding with the appeal against them. On that basis, I proceeded with the appeal against them and dismissed it with costs of RM4,000 subject to allocator.

[7] These are my grounds for doing so.

THE APPEAL

[8] On the authority of *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30, the appeal would be by way of a re-hearing of the setting aside application.

[9] In the setting aside application, the defendant's applied:

(a) for an extension of time, if needed;

(b) to set aside the default judgment; and

(c) for leave to file their defence within 14 days.

EXTENSION OF TIME

[10] Under O 13 r 8 read with O 42 r 13 of the Rules of Court 2012, a party intending to set aside a default judgment 'shall make an application to the court and serve it on the party who has the order or judgment by him'. Here the default judgment was entered on 9 January 2020, and the setting aside application was only filed on 29 January 2021, over a year late. Clearly, they needed the extension of time and were required to provide an explanation for the delay in order to get it.

[11] Having perused the affidavit in support of the setting aside application which the second defendant affirmed for all three defendants, I am of the view

that no credible explanation has been provided for the delay. The defendants allege that they only got to know of the default judgment in March 2020 when the first defendant received the statutory notice issued under s 466 of the Companies Act 2016. However, their solicitors wrote to the plaintiff for more information about the default judgment only in December 2020. There was no credible explanation for that lapse.

SETTING ASIDE THE DEFAULT JUDGMENT

[12] The second and third defendants raised three grounds for setting aside the default judgment, which I shall deal with in turn. They are:

(a) the service of the writ and statement of claim by registered post was defective, entitling them to set aside the default judgment *ex debito justitiae*;

(b) the plaintiff was obliged to sell off the first defendant's assets first before proceeding against them; and

(c) the amount claimed is excessive, more so in the absence of particulars and the inconsistency with the first defendant's statements of account.

Service of the writ and statement of claim

[13] In this case, the plaintiff's solicitors served the writ and statement of claim by registered post and adduced the postal slips issued by the postal authorities to show when that was done.

[14] The second and third defendants contend that that service is defective because it did not comply with O 10 r 1(1) of the Rules of Court 2012. They rely on the decision of the Federal Court in *Goh Teng Whoo & Anor v Ample Objectives Sdn Bhd* [2021] 3 MLJ 159.

[15] Order 10 r 1(1) of the Rules of Court 2012 expressly provides:

> Subject to the provisions of any written law and these Rules, a writ shall be served personally on each defendant or sent to each defendant by prepaid AR registered post addressed to his last known address and in so far as is practicable, the first attempt at service must be made not later than one month from the date of issue of the writ.

[16] In *Goh Teng Whoo*, the Federal Court set aside the default judgment entered against the defendants because the plaintiff had served the writ on them under O 10 r 1(1) of the Rules of Court 2012, but failed to adduce the AR Registered cards to prove service.

[17] AR Registered Post is indeed not the same as same as Registered Post. For AR Registered Post, a card is issued with the letter, and the recipient is to sign that card to confirm he had received it. The sender will need to adduce that card as confirmation and proof of service. There is no such card with Registered Post and the postal slip issued by the postal authorities that I mentioned earlier is proof of service.

[18] What distinguishes *Gong Teng Whoo* from our case here is that the plaintiff did not effect service of the writ and statement of claim under O 10 r 1(1) of the Rules of Court 2012. Instead, under the provision 'Subject to the provisions of any written law and these Rules' of O 10 r 1(1) of the Rules of Court 2012, the plaintiff invoked O 10 r 3 which permits service of a writ pursuant to the terms of a contract.

[19] The contract between the plaintiff and the second and third defendants is a guarantee and indemnity agreement dated 13 July 2011 ('the guarantee'), and it is this contract that the contractual terms and liability of the second and third defendants to the plaintiff (if any) is to be determined.

[20] In respect of service of legal process, cl 17 of the guarantee expressly provides:

> The service of notice and/or any legal process which includes pleadings, all forms of originating processes, interlocutory applications of whatever nature, affidavits, orders, and such documents other than the aforesaid which are required to be served under the Rules of the High Court, 1980, Subordinate Court Rules, 1980 or the Companies Act, 1965 and the rules made thereunder may be given by *ordinary or registered post* sent to the address as stated herein and shall be deemed to have been duly served and duly received upon the expiry of three (3) days after the same is posted. We further agree that no change of address of any of us shall be effective on you unless actual notice of the change have been given by us. (Emphasis added.)

[21] As the writ and statement of claim were served on the second and third defendants by registered post in compliance with cl 17 of the guarantee, and the plaintiff had adduced slips issued by the postal authorities establishing when service was effected, the service was good in law and this objection fails.

Whether the plaintiff was obliged to sell off the first defendant's's assets first before proceeding against the second and third defendants

[22] I would also reject this allegation. Clause 1 of the guarantee expressly provided that the second defendant jointly and severally unconditionally and irrevocably agreed and under took to guarantee and indemnify the plaintiff:

> To pay and keep you indemnified and satisfy you on demand as principal obligators and not merely as sureties the punctual payment by the Customer of the BBA Sale

Price and BIS Sale Price, and all sums of money which hereafter may from time to time be due and unpaid to you from the Customer together with all costs, charges and expenses which you may incur in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment of all or any part of the BBA Sale Price and BIS Sale Price, You shall not be bound or required to proceed against any of the other securities taken before enforcing this guarantee against us.

[23] The plaintiff's right under the guarantee to proceed against the second and third defendants without recourse to the first defendant was further emphatically cemented by cll 3, 7, 8 and 9 of the guarantee, which provided:

3. You shall, without reference to us be at liberty but shall not be bound to resort for your benefit to any other means of payment at any time and in any order you may think fit without thereby diminishing our liabilities and you may so long as any monies remain owing and unpaid by the Customer to you exercise your rights under this guarantee and Indemnity Agreement for the payment of any such monies owing to you before or after resorting to other means of payment as you may think fit. In addition you shall be at liberty to require payment by us of any such monies owing to you without taking proceedings first to enforce such payment by the Customer

...

7. Our liabilities and obligations created hereunder shall continue to be valid and binding for all purposes whatsoever notwithstanding any change by amalgamation, reconstruction or otherwise which may be made in your constitution or of the Customer and we hereby agree and declare that no change of any sort whatsoever in relation to or affecting the Customer shall in any way affect our liabilities and or obligations created hereunder in relation to any transaction whatsoever whether past, present or future.

8. Recovery against us shall not in any way be barred, prejudiced, invalidated or affected notwithstanding any defect, informality or insufficiency in the borrowing powers of the Customer or the exercise thereof which might be a defence as between you and the Customer.

9. The winding-up or liquidation of the Customer shall not affect or determine our liabilities under this guarantee and Indemnity Agreement but such liability shall continue in full force and effect.

[24] I would also rely on the Federal Court decisions in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 and *Chan Boi Loi v Public Bank Bhd and another application* [2011] 1 MLJ 478 that a lender is entitled to pursue all remedies simultaneously, contemporaneously or successively to recover monies unless there is any agreement to the contrary. In the former, Gopal Sri Ram JCA (as he then was) said:

Now it is trite that a charge/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings in rem under s 256 of the Code. He may sue the principal debtor

A (who may or may not be the chargor) upon the personal covenant contained in the loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively.

B *Whether the amount claimed is excessive, is absent of particulars and is inconsistent with the first defendant's statements of account*

[25] I would also reject this allegation, on the basis of cl 14 of the guarantee which expressly provided:

C

> It shall not be necessary for you to advise us on any details relating to the administration of the Customer's account with you or of any default thereunder of which you may have knowledge. We further agree that any admission or acknowledgement in writing by the Customer or any authorized person on the Customer's behalf or a statement of account in writing showing the indebtedness of
D the Customer signed on your behalf by any of your Officers shall be conclusive and binding on us or any of us as to the amount due to you by the Customer.

[26] By this clause, the amount stated in the plaintiff's *Sijil Perakuan Hutang* is conclusive and binding on the second and third defendants, and the plaintiff
E is under no legal obligation to provide them with details.

[27] The conclusiveness of statements of account in the light of these contractual provisions is settled, and has been pronounced in many decisions, of which I would only refer to two, namely *Citibank Na v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 and *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685.

F

CONCLUSION

G **[28]** I accordingly affirmed the decision of the senior assistant registrar to dismiss the setting aside application and I dismissed the appeal. I also ordered the second and third defendants to pay costs of RM4,000 to the plaintiff, subject to allocator.

H *Appeal dismissed; and SAR's decision affirmed.*

Reported by Ashok Kumar

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